

PPP CONTRACTS IN HUNGARY¹

I. Introduction

Since the very first social communities, there have been numerous needs the satisfaction of which is vital for every individual. With the evolvement of the State, this meant that there was demand for performing certain medical, educational, social etc. tasks on a macro level. Due to this phenomenon, it was necessary to establish such institutions which were able to serve these demands. In the 20th century social needs were multiplied and individuals expected that the State perform these task more effectively. Certainly, it was very costly, moreover, the economic and social changes of that century made this more difficult. Responding to these processes searching for methods of alternative public task performance was started in the second half of the 20th century.² This created opportunity for getting private parties and their capital involved in the public task performance.³ Most of the States recognised in time that satisfying social needs only with traditional administrative methods was not enough and that finding new solutions (ergo different methods of alternative public task performance) was necessary. One method of alternative public task performance is the cooperation of the public and the private sector, namely the Public-Private Partnership (hereinafter: PPP or P3).

The aim of this study is to represent the legal institution of PPP focusing on the Hungarian conditions. For this purpose, the meaning, the main characteristics and the origin of PPP contracts are described below. The research also extends to clarify the theoretical questions as the definition and the dogmatic classification. Besides I would like to create an image of the Hungarian situation of PPP. To understand that, it is necessary to examine other countries' PPP practise.

¹ It is necessary to notice in advance that the base of this study is another study (named: Typically atypical or public contract? The theory and practise of the Public-Private Partnership) which was written with Szabolcs Hajdu for the XXXIIIth National Conference of Scientific Students' Associations in 2017.

² HORVÁTH M. Tamás: *Közmenedzsment*. Dialog Campus Kiadó, Budapest-Pécs, 2005. 151.

³ VARGA Judit: *A partnerség (PPP) szerepének változása a közpénzügyek jogában*. (Doktori PhD értekezés) Marton Géza Állam- és Jogtudományi Doktori Iskola, Debrecen, 2016. <https://dea.lib.unideb.hu/dea/handle/2437/230895> (2016.09.05.) 13.

II. PPP as a method of alternative public task performance

The legal institution of P3 is a method of alternative public task performance as it was mentioned above. But what is a public task? And what is its alternative performance compared to the traditional way?

According to *Tamás M. Horváth* public tasks means providing the performance of such tasks which (under determined conditions) necessitate common organization to a certain extent and which reserve the satisfaction of common social needs.⁴ We speak about traditional public task performance if it happens from public funds, budgetary resources and via budgetary organization.⁵ Alternative public task performance means service organizing solutions which are provided by parties outside the public sector under State control involving resources which are not part of the public finances. So, in that case the State cooperates with parties of the private sector. There are several methods of alternative public task performance which are substantial instruments in satisfying common needs.⁶ These are summarized in the table below:

PURELY PUBLIC LAW SOLUTION	PUBLIC AND PRIVATE LAW SOLUTION	PURELY PRIVATE LAW SOLUTION
reduction of aid	contracts (e.g. sale contracts, lease contracts etc. above certain public procurement thresholds)	contracts (e.g. sale contracts, lease contracts etc. below certain public procurement thresholds)
	administrative contracts (e.g. PPP)	volunteering, self-help organisations (if there is no state aid)
	associations	
	volunteering, self-help organisations (if there is state aid)	
	instruments of charging policy	

1. Classification of methods of alternative public task performance. Source: VARGA, 2016. 71.

The aim of this short part was to make the role of PPP contracts in administrative law more understandable.

⁴ HORVÁTH M. Tamás: *Helyi közszolgáltatások szervezése*. Dialog Campus Kiadó, Budapest-Pécs, 2002. 15.

⁵ VARGA, 2016 18.

⁶ VARGA Judit: *3P: Életképtelen jogalkotási vadhajítás vagy a közösségi igények kielégítésének működőképes alternatívája?* 2015.

<http://kozjavak.hu/3p-életképtelen-jogalkotasi-vadhajtas-vagy-kozossegi-igenyek-kielegitese-nek-mukodokepes> (2017.09.03.).

III. PPP contracts in general

Before the dogmatic questions, namely the definition and dogmatic classification of PPPs, it is useful to describe PPP contracts in general.

III. 1. What is a PPP contract?

In my own words P3 is a special contract made between the public and the private sector for performing a public task. Such public task can be building prisons, educational institutions, dormitories or highways. However, in this case the State does not perform the public task by itself and only from state budget but with the help of the private sector and its capital and at the same time the two sectors share the liability. It should be noted that these are highly complex contracts since the performance of these huge projects are divided into two different sectors in such a way that they both are able to benefit from the relationship. So basically this legal institution means strong and tight cooperation between the public and the private sector. This relationship is definitely a complex one as it was mentioned before and it needs a long and detailed preparation due to the dissimilar features, dissimilar legal instruments and solutions of the two sectors. With the PPP the boundaries which separate the two sectors are blurred and reaching common goals requires as effective cooperation between them as it is possible.

III. 2. Why were PPPs created?

One of the reasons of P3s is the so called ‘Value for Money’ principle which is applied for measuring cost-effectiveness. The point of it is that the highest value shall be got for the same amount of money.⁷ It is very important whether a certain PPP contract make the expected results or not. Although it is also important whether the result with the help of PPP was made more effectively and in better quality than if the project had been performed with the traditional method of public task performance.⁸ Based on the ‘Value for Money’ principle, it is calculable which of the following solutions the best are: the one time purchase of equipment (when expenditure is arisen all at once) or purchasing equipment with PPP (when expenditure is not arisen all at once). In this case expenditure is examined and the public law party chooses the option which is (under the same conditions) suitable for performing a public task in a lower price.

The other reason of PPP is the convergence criteria of the European Union (hereinafter: EU). According to one of the criteria, debt level of a State cannot exceed 60% of GDP. Thus in order to fulfil this condition the State could not provide enough financial support only from state budget for public investments. But with the help of PPP investments connected

⁷ TASI Péter: *A PPP – alkalmazási lehetőségek, tapasztalatok, avagy: Csodaszer vagy divatos kényszer?* 2004. http://www.sze.hu/etk/_konferencia/publikacio/Net/eloadas_tasi_peter.doc (2017.09.02.) 2–3.

⁸ KOZMA Miklós Attila: *Értéktéremtés Public-Private Partnership keretében – különös tekintettel a vállalkozó szemenpontjaira.* (Doktori PhD értekezés). Budapesti Corvinus Egyetem Gazdálkodástani Doktori Iskola, Budapest, 2009. http://phd.lib.uni-corvinus.hu/529/1/kozma_miklos.pdf (2016.09.23.) 52.

to performing a public task can be carried out from private capital without encumbrance of state budget at once.⁹

For 2010, the number of PPP investments had increased. The explanation of this is the lack of State resources on the one hand, and on the other hand the cost saving feature of PPP contracts.¹⁰

III. 3. Why are PPP contracts useful?

Before the overview of advantages, an example can be very useful in order to understand the point of PPP. A societal need arises to a highway however the State has no resources enough to carry out the project. State has two options to satisfy this need. The first option is that the State orders a construction plan, requires credit and chooses a building contractor during a procurement procedure. This building contractor will carry out the investment and get the consideration of the construction. Later, the operating costs (renovation, repair etc.) will burden the State. The second option is to use the help of PPP. In this case building contractor is also chosen during a procurement procedure, but construction plans will be made by the building contractor and not by someone else as in the first case. Why is it better? The answer is very simple. After the process of construction operation will be the obligation of the building contractor for a long time (these are long term contracts), therefore the building contractor's interest is to minimise the operating costs. Plans will be made in the light of this because from the aspect of the building contractor the lower costs are, the higher profit realise. State will pay a fee as a consideration yearly which is fixed in advance. The sum of this fee is depend on the agreement of the parties and the type of the PPP contract. Subsequently, the building contractor's interest to perform its obligation in a way that all its costs will be covert by this fee. After the expiration of the contract, the ownership of the instrument will transfer to the State.¹¹

This short example makes a lot of advantages of the State perceptible, but they should be examined more precisely.

From the fiscal side of this legal institution, it is necessary to highlight again that with P3 the financial burden and some part of the risks are incumbent on the private sector and operating costs also burden the parties of the private sector. The consideration of the State is a fee which is obviously higher than the operating costs so operating costs borne by the State indirectly through this fee. The financial burden of the State will be arisen during a longer period by small and small, therefore state budget will be borne not all at once.¹² Moreover, during this cooperation the attitude of the private sector has an effect on the public sector. This means that a profit-making attitude appears in the public task performance which inspires the public sector to work more effectively from fewer expenditure just like

⁹ TASI, 2004 2–3.

¹⁰ CSONKA Zsuzsa: *PPP beruházások Magyarországon, az M6-os autópálya esettanulmányán keresztül*. Budapesti Gazdasági Főiskola Külkereskedelmi Főiskolai Kar, Budapest, 2011. http://elib.kkf.hu/edip/D_15762.pdf (2017.09.02.) 8.

¹¹ TASI, 2004. 3–4.

¹² Ibid. 2.

in case of a party of the private sector.¹³ Valuable innovation from the private sector can raise the quality of the result of the cooperation and the flexibility of the private sector is also very useful.¹⁴

From the aspect of the private sector the following question is arisen: why is it worth taking part in such cooperation? One of the most important advantages from the aspect of the private sector is that the State probably will perform its obligation to pay, therefore the private sector is not threatened by breach of contract.¹⁵ P3 projects are started due to perform a public task and if the State does not pay the prior determined fee it will fail to fulfil its obligation to perform a public task.¹⁶ Besides, it is very likely that service as the result of the cooperation will have demand.¹⁷

Finally, risk-sharing is something which is useful for both parties.

III. 4. What can be the danger in a PPP contract?

PPP contracts mean high risk as in case of every complex legal institution. These can be different of course based on the abilities and degree of the cooperation of the parties. It is necessary to highlight the possible disadvantages and dangers of this relationship.

The first problematic element is that these are long-term cooperations¹⁸ which can cause several uncertainties for example economic¹⁹ or political changes. The government power is very inconsistent and governments tend to undertake an obligation which seems to be very useful at the first time but performance will be burden the State, but not necessarily the same government, for a long time.²⁰ Risk-sharing as an advantage was mentioned before, but it can be a danger as well since it requires very detailed P3 contract. If the parties cannot guarantee this detailed contract, the balance of this risk-sharing can be disturbed. Some experts say that PPP can ensure transparency in spending public funds.²¹ However, in this case public task performance is bipolar, therefore both parties are need to be supervised which can make the monitoring tasks longer and more complex. Last but not least, absence of specific legal rules can also cause uncertainty. This refers to most countries where PPP contracts are applied. Uniform legislation could ensure that both parties enjoy the advantages of the cooperation.²² Although it is necessary to note that the absence of this uniform legislation can provide many advantages at the same time.

¹³ VARGA, 2016. 41.

¹⁴ CSONKA, 2011. 9.

¹⁵ VARGA Judit: *PPP a börtönben*. In: Horváth M. Tamás (szerk.): *Kilengések – Köszolgáltatási változások*. Dialog Campus Kiadó, Budapest-Pécs, 2013. 311.

¹⁶ TASI, 2004. 15.

¹⁷ VARGA, 2013. 311.

¹⁸ Leiner Vera (szerk.): *PPP-kézikönyv: a köz-és magánszféra sikeres együttműködése*. GKM, Sajtó és Protokoll Főosztály, Budapest, 2004. 17.

¹⁹ VARGA, 2016. 47.

²⁰ VARGA Mihály: *A PPP Magyarországon – Árt nekünk vagy használ?* Pénzügyi szemle 2005/1. 56.

²¹ VARGA, 2016. 45.

²² LEHMANN Marianna: *A Public-Private Partnership alkalmazásának jelentősége és elszámolása az uniós módszertanban*. In: Simon István (szerk.): *Tanulmányok Nagy Tibor tiszteletére*. Szent István Társulat, Budapest, 2009. 121.

IV. The dogmatism of PPP

Hereon the theoretical side of PPP contracts are examined, namely, the definition of the PPP and the dogmatic classification. These topics are important and exciting because there are many debates about them both here and abroad. Definition is studied at international level, whereas dogmatic classification is examined between the Hungarian legal framework.

IV. 1. The definition of PPP

Begin with the first issue if we would like to find an appropriate definition we can easily figure out how hard task it is. A uniform definition was not made neither in the Hungarian nor in the foreign legal sciences and the meaning of P3 can be different from state to state.²³ One of the reasons of that is the strange features of the PPP, namely that these contracts are usually not regulated by any acts therefore there is no a uniform definition from the legislator.²⁴ Several definitions were created of course both in Hungary and abroad, but these are not widely accepted because every definition highlights something else than the others. However finding a proper definition is one of the most important components when somebody makes a scientific research related to a legal institution, therefore an own definition was created based on the most important Hungarian and foreign definitions. According to it *PPP is (1) a long-term cooperation (2) between the public and the private sector (3) which is always made with the aim of providing a public task effectively and (4) which is always connected to public interests (5) therefore the final beneficiaries are the citizens*. In my point of view these factors are the substantive parts of the definition and other factors need to be examined case-by-case.

IV. 2. The dogmatic classification of PPP

After the clarification of the definition we can deal with the next issue: the dogmatic classification. The point of the debate is that whether a P3 contract is an atypical contract of the private law or an administrative contract of the public law? This is hard to tell if features of the atypical contracts, the administrative contracts and PPP contracts are observed. It can be concluded that basically PPP belongs to the private and the public law since PPPs are characterized by certain features of the atypical contracts and certain features of the administrative contracts at the same time. Therefore, one of the typical features of PPPs is that kind of dichotomy. Although if PPP is characterized by the features of the atypical contracts and also by the features of the administrative contract what type of contract and what type of law does the P3 belong to after all? Does it belong to the atypical contracts and private law or does it belong to the administrative contracts and public law? The question of dogmatic classification is definitely not so important from the aspect of performing a PPP project. However, on the one hand the result of dogmatic classification can be an

²³ VARGA, 2016. 21.

²⁴ Papp Tekla (szerk.): *Atipikus szerződések*. Opten Informatikai Kft., Budapest, 2015. 237.

effective guidance during the decision making in a legal dispute and on the other hand this is a basic issue of a scientific research, this question cannot leave opened.

First, it can be useful if the most important features of the public and the private law are summarized. The following table enlists them:

DISTINGUISHING CRITERIA	PUBLIC LAW	PRIVATE LAW
<i>FUNCTIONAL</i>	<i>ensuring the organisation of the State</i>	promotion of individuals' legally recognised rights
<i>HIERARCHICAL</i>	subordinate relationship	<i>interdependent relationship</i>
<i>EQUALITARIAN</i>	institution exercising public authority has extra rights	<i>equality of parties</i>
<i>AUTONOMOUS</i>	<i>public law relationship is independent of the intention of the obligated party</i>	<i>private law relationship is dependent of the intention of the parties</i>
<i>INTEREST BASED</i>	<i>public interest is primary</i>	private interest is primary
<i>COMPULSORY BASED</i>	direct compulsion can be applied	<i>direct compulsion cannot be applied, sanction is usually compensation</i>
<i>FORMAL</i>	usually cogent rules	<i>usually dispositive rules</i>

2. Distinction between the public and the private law. Source: Trócsányi László – Schanda Balázs (szerk.): *Bevezetés az alkotmányjogba*. HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2013. 24–25. (Author)

The features of P3 are highlighted on the table which shows that PPP contracts have features of the public law and features of the private law at the same time.

The next table is about the distinction between the atypical contracts and administrative contracts.

ATYPICAL CONTRACTS	ADMINISTRATIVE CONTRACTS
<i>long-term business relationship</i>	we cannot speak about a long-term business relationship necessarily
<i>one of the parties is always a business</i>	<i>one of the parties is an entity regulated by public law</i>
the aim of the contract is always to gratify private interests	<i>the aim and the subject of the contract is special: performing public tasks</i>
<i>foreign practise is important during the legislative procedure</i>	foreign practise is not particularly important during the legislative procedure

3. The most important features of atypical and administrative contracts from the aspect of PPP. Source: Papp (2015) 37–39., Fazekas Marianna (szerk.): *Közigazgatási jog Általános rész III.* ELTE Eötvös Kiadó, Budapest, 2013. 89. (Author)

After most important features of the atypical and the administrative contracts are examined, features of PPP are highlighted again, it can be concluded that (1) PPP belongs to both side, (2) PPP is mostly belong to the atypical contracts, (3) PPPs are administrative

contracts. One of the purposes of this study is to prove with an own argumentation that PPP contracts should be considered as administrative contracts in Hungary.

Maybe the most important factor is that one of the parties is always the State itself. This is also one of the basic features of the administrative contracts, while the State normally does not take part in an atypical contract. When the State takes part in an administrative contract, it is considered as a public entity. When the State takes part in an atypical or a typical contract it has to be considered as a private person except when the subject-matter of the contract is public property, because in this case the State remains a public entity.²⁵ In PPP contracts the State performs from budgetary resources (although not at the same time as it was mentioned before), therefore the subject-matter of a P3 contract is always connected to public properties and this is why the State remains public entity. Besides, all the examined definition says that PPP is a cooperation between the public and the private sector. If the State had to be considered as a private person, all definition would be senseless.

General provisions pertaining to contracts of the Act V of 2013 on the Civil Code (hereinafter: Hungarian Civil Code) shall be applied to the atypical contracts. One of the most important principle relating to contracts is the freedom of contract which says that *“the parties are free to conclude a contract and to choose the other party.”*²⁶ Since in PPPs one of the parties is always the State the private person cannot choose freely who it makes a contract with, the other party is necessarily the State. So, it can be called basically the restriction of the freedom of contract.²⁷

Other important factor is that administrative contracts are made due to satisfy public interests. However the main reason of making an atypical contract is always gratifying private interests. Since the final beneficiaries of PPP contracts are the citizens as a group of people and not individuals, it can be concluded that PPPs are made due to satisfying public interests and not private ones just like in case of the administrative contracts.

The Hungarian Civil Code governs that the property and personal relations of persons under the principle of interdependence and the principle of equality,²⁸ so interdependence is an important principle of atypical contracts as well. After the description of the previous factors can we really speak about the interdependence of the parties in a PPP contract? During the examination I concluded that the answer is no. A PPP contract cannot be made at all as long as the State does not decide that it wants to perform certain public task with the help of the private sector and the capital of the private sector and not on its own and not totally from budgetary resources.

These are the factors which support my opinion that P3 contracts should be considered as administrative contracts and not as atypical ones in Hungary despite the fact that these do not have all of the features which characterise administrative contracts.

²⁵ LEHMANN, 2009. 120.

²⁶ Book 6 section 59 paragraph (1) of the Hungarian Civil Code.

²⁷ It has to be highlighted that freedom of contract is not applied fully in many cases of classical civil law contracts either, for example: standard contract terms (book 6 chapter XV of the Hungarian Civil Code) or obligation to contract (book 6 chapter XIII of the Hungarian Civil Code).

²⁸ Book 1 section 1 of the Hungarian Civil Code.

V. PPP in practise

In order to describe the situation of PPP in Hungary it is necessary to examine the PPP practise in Hungary and abroad as well. In the first subsection the foreign PPP practise is described.

V. 1. PPP abroad with special focus on the European Union

It should be noted in advance that PPP was used first in the 1960s in the United States of America (hereinafter: USA). Its application was started in the 1990s in Great Britain and it was widespread in countries of the continental Europe a little later.²⁹ In general PPP has no legal definition and it is codified in a low degree but of course there are some exceptions (e.g. Spain or Portugal).³⁰

To understand the situation of PPP at international level, some countries' practise is examined. In these countries PPP contracts play relatively important role in the economy. According to a study on the official website of Canada, there have been over 220 infrastructure projects across different sectors delivered by the PPP approach, representing over \$70 billion of capital investment. Canada states that P3 projects have had a positive impact on the national economy over the past decade. Based on the PPP projects from 2003 to 2012, they found that the economic impacts of the Canadian infrastructure PPP projects support direct employment, earning \$19 billion in direct income/wages and benefits, and contributing \$25.1 billion in direct GDP to Canada.³¹ But Australia's P3 market also continues to grow and evolve. The number and value of PPP transactions reached historical highs: there were 9 new PPP projects in the value of \$12 billion in 2015.³² And according to Indian Department of Economic Affairs from 2005 to 2017 220 PPP projects started there.³³

Although PPP contracts are not so developed and common used everywhere. A study for example says that while the United Kingdom's National Audit Office reports over £4 billion a year on average in capital investment from P3s over the past 15 years, in the US, where the economy is more than six times bigger, only five P3 deals worth a total of \$2.4 billion closed in 2015.³⁴ Although P3 contracts in the USA has become more popular, their usage are far less significant than the countries mentioned before.

²⁹ PAPP, 2015. 236.

³⁰ PAPP, 2015. 237.

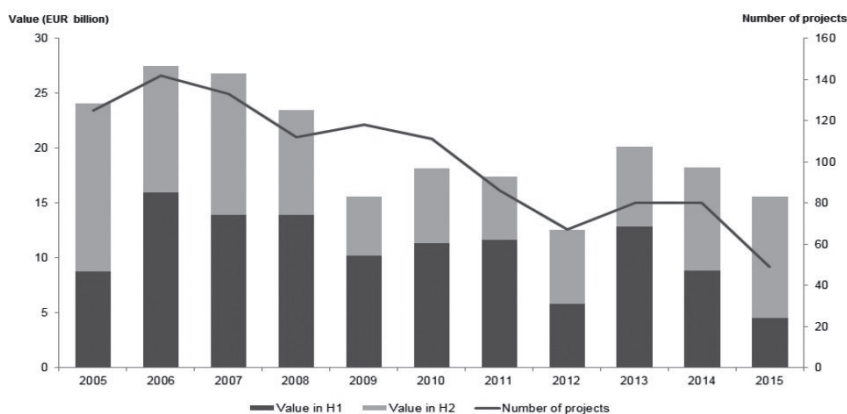
³¹ YUAN, X.-X. – ZHANG, J.: *Understanding the Effects of Public-Private Partnerships on Innovation in Canadian Infrastructure Projects*. 2016. <http://www.p3canada.ca/en/about-p3s/p3-resource-library/report-on-construction-innovation-in-p3s-by-the-ryerson-institute-for-infrastructure-innovation/> (2017.09.13.) 10–11.

³² Ernst & Young: *Australian infrastructure: some facts and figures*. 2016. [http://www.ey.com/Publication/vwLUAssets/ey-australian-infrastructure-some-facts-and-figures/\\$FILE/ey-australian-infrastructure-some-facts-and-figures.pdf](http://www.ey.com/Publication/vwLUAssets/ey-australian-infrastructure-some-facts-and-figures/$FILE/ey-australian-infrastructure-some-facts-and-figures.pdf) (2017.09.13.) 18.

³³ List of PPP projects in India. <https://www.pppinindia.gov.in/project-list> (2017.09.13.)

³⁴ PricewaterhouseCoopers: *Public-private partnerships in the US: The state of the market and the road ahead*. 2016. <https://www.pwc.com/us/en/capital-projects-infrastructure/publications/public-private-partnerships.html> (2017.09.13.) 1.

In the European Union, which has very significant role in case of member states, the following figure shows well that although the number and value of PPP projects decreased in 2016 compared to the period from 2005 to 2007, there are still huge PPP projects.



4. European PPP Market 2005-2015. Source: European PPP Expertise Centre: Market Update Review of the European PPP Market in 2016. 2017. <http://www.eib.org/infocentre/publications/all/epec-market-update-2016.htm> (2017.09.14.) 1.

According to the European Parliament, Europe leads the infrastructure PPP market, concentrating more than 45% of the nominal value of all PPPs worldwide which shows the growing significance of this legal institute.³⁵ Despite this growth there is no sui generis sources of law, but the institutions of the European Union regulated PPP with framework instruments.³⁶ It seems anyway that more specified legal rules have not been required by the private sector up to this day.³⁷ The so called ‘Green Book’ made by the European Commission has outstanding importance because it determines the most important features of P3s³⁸ and its aim, inter alia, to discover the uncertainties of PPPs and to discover which framework instruments are accordance with the special features of P3.³⁹ European PPP Expertise Centre as an institution of the European Investment Bank plays an important role in PPP. Its mission is to support the public sector across Europe in delivering better

³⁵ European Parliament: *Addressing conflicts of interest in public-private partnerships (PPPs)*. 2015. [http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/545722/EPRS_BRI\(2015\)545722_REV1_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/545722/EPRS_BRI(2015)545722_REV1_EN.pdf) (2016.10.14.) 2.

³⁶ JENOVAI Petra: *Public Private Partnership az egyes nemzeti jogokban és az Európai Unió jogában különös tekintettel az Egyesült Királyságra és Németországra*. Jogelméleti Szemle, 2011/4. http://jesz.ajk.elte.hu/jenovai48.html#_ftn1 (2016.10.10.)

³⁷ Commission of the European Communities: *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions*. Brussels, 15.11.2005. COM(2005) 569 final 5.

³⁸ Commission of the European Communities: *Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions*. Brussels, 2004. COM(2004) 327 final point 1.

³⁹ Ibid. point 18.

P3s.⁴⁰ The European Investment Bank is one of the most important financier of PPPs and it promotes the broader usage of P3. The primary reason of this financing activity is that the European Investment Bank shall contribute to the balanced and steady development of the internal market in the interest of the Union and PPP is a great tool for this.⁴¹

In my opinion it becomes perceptible with the data above that the legal institution of PPP is broadly used worldwide. Now we can examine the Hungarian situation of PPPs.

V. 2. PPP in Hungary

First, it should be noted that PPP contracts cannot be made freely, the prior consent of the Government or the Minister of State for Public Finances is needed.⁴² So, this is sort of the rejection of PPP contracts in Hungary. What can be the reason of this rejection when we saw that P3 is quite a popular legal institution abroad and it was used in Hungary before?

In order to answer this question it is necessary to study the Hungarian PPP practice. After the examination of the Hungarian PPP projects, it can be concluded that in general they were unsuccessful. There are numerous reasons like the lack of the economic stability, the lack of impact studies and the lack of regulation by act. Moreover, the dogmatic confusion of the theoretical side affected the practice because we cannot speak about a clear Hungarian PPP model. According to the title of these contracts, they are P3s but based on the content it cannot be decided that:

- whether these contracts are clearly PPP contracts one of the basic features of which is the dichotomy, namely that they are characterized by the features of the atypical and the administrative contracts at the same time or
- whether these contracts are administrative contracts or
- whether these contracts are atypical contracts or
- whether they are typical contracts regulated by the Hungarian Civil Code.

The theoretical and practical difficulties resulted unsuccessful Hungarian projects, and there is not a strong and stable PPP culture. Therefore, in 2010 the support and application of PPPs came to end. However of course it is necessary to find a reason for that in the science of the public administration. This reason can be the strengthening of the conception of Neo-Weberian state from 2010 in Hungary and this led to the rejection of the PPP which belongs to the New-Public Management. These ideas, the Neo-Weberian state concept and the New Public Management represent completely different priorities. The central element of the prior one is the empowerment of the state and the public administration and according to this in order to reach common good the market is not enough.⁴³ While the aim of the New Public Management is the reduction of the role of the state and in order

⁴⁰ Welcome to EPEC. <http://www.eib.org/epec/> (2016.09.05.)

⁴¹ VARGA, 2016. 118.

⁴² Section 9 paragraph (1) of Act CXCV of 2011 on the Economic Stability of Hungary.

⁴³ STUMPF István: *Szakmai alapú közigazgatás – A neoweberianus állam*. In: Halm Tamás – Vadász János (szerk.): *A modern állam feladatai. Magyar Közgazdasági Társaság és a Gazdasági és Szociális Tanács konferenciájának előadásai*, Budapest, 2009. 93.

to reach effectiveness and make profit in the public administration it seems necessary to enhance the role of the private sector and market mechanisms.⁴⁴

With the strengthening of the Neo-Weberian state in Hungary, the legal institution of the P3, as an element of the New Public Management, was “necessarily” restricted while in Europe and in the other parts of the world both the public and the private sector can make profit from this kind of cooperation.

VI. Consequences

Today tasks of the State are multifaceted the performance of which needs effective tools. Because of this different methods of alternative public task performance were created which provide facilities to get parties outside the State involved. One of the methods of alternative public task performance is the Public-Private Partnership which is a special contract made between the public and the private sector for performing a public task. In this case, the State does not perform the public task by itself and only from state budget but with the help of the private sector and its capital and at the same time the two sectors share the liability.

Reasons of creating the legal institution of PPP is the so called ‘Value for Money’ principle on the one hand and the convergence criteria of the European Union on the other hand. Advantages of the application of PPP from the aspect of the State are (inter alia) the following: the financial burden and some part of the risks are incumbent on the private sector and operating costs also borne by the parties of the private sector; during this cooperation the attitude of the private sector has an effect on the public sector; valuable innovation from the private sector can raise the quality of the result; the flexibility of the private sector is also very useful. Cooperation is also worth for the party of the private sector because the State probably will perform its obligation to pay, therefore the private sector is not threatened by breach of contract. PPP projects are started due to perform a public task and if State does not pay the prior determined fee it will fail to fulfil its obligation to perform a public task. Besides it is very likely that service as the result of the cooperation will have demand. And finally risk-sharing is something which is useful for both parties. But risks should not be forgotten neither. PPP contracts are long-term cooperations which can cause several (inter alia economic and political) uncertainties. Risk-sharing can be considered as an advantage but it can be a danger as well since due to this a very detailed PPP contract is required. If the parties cannot guarantee this detailed contract, the balance of this risk-sharing can be disturbed. Besides, in this case public task performance is bipolar, both parties are need to be supervised which can make the monitoring tasks longer and more complex.

If it is necessary to find an appropriate PPP definition it has to be noted that a uniform one was not made neither in the Hungarian nor in the foreign legal sciences and the meaning of PPP can be different from state to state. Several definitions were created of course both in Hungary and abroad, but these are not widely accepted because every definition highlights something else than the others. However finding a proper definition is one of

⁴⁴ KRIZSAI Anita: *A szociális szolgáltatások szervezésének szabályozása a közszektor szereplőinek feladatai szempontjából*. (Doktori PhD értekezés). Marton Géza Állam-és Jogtudományi Doktori Iskola, Debrecen, 2014. 39–41.

the most important components when somebody makes a scientific research related to a legal institution. This is why an own definition was created which says that *PPP is (1) a long-term cooperation (2) between the public and the private sector which is (3) always made with the aim of providing a public task effectively and which is (4) always connected to public interests (5) therefore the final beneficiaries are the citizens.*

In Hungary PPP divides the legal literature and the legislation as well. It divides the legal literature because there is no united position regarding the dogmatic classification, namely whether it is an atypical or an administrative contract. It divides the legislation because during the application of PPP detailed regulation was widely required and because due to the current government there is no possibility to apply PPP contract today in Hungary.

Regarding the dogmatic classification, it was tried to prove with an own argumentation that PPP contracts should be considered as administrative contracts in Hungary.

Regarding the suspension of application of PPP contracts, it has to be admitted that the usage of this legal institution was not proper. On the one hand there is not a clear Hungarian PPP model and on the other hand most of the PPP projects were unsuccessful which has several reasons. Problem of unsuccess arises abroad as well but as it was represented before the application of PPP is very common and significant in many countries. Therefore, it is necessary to find a reason for that. In my opinion this reason is the strengthening of the conception of Neo-Weberian state from 2010 in Hungary. This led to the rejection of the P3 which belongs to the New-Public Management because these ideas represent completely different priorities. With the strengthening of the Neo-Weberian state in Hungary PPP, as an element of the New Public Management, was “necessarily” restricted while in Europe and in the other parts of the world both the public and the private sector can make profit from this kind of cooperation.

The aim of the study was to examine the legal institution of PPP as a special contract made between the public and the private sector. There are very interesting theoretical issues about P3 which are well worth an examination. However, it is more important that in my point of view PPP can be a very effective method of public task performance and it can be very advantageous not just for the public and the private sector but for the citizens as well. This is why it would be necessary to study the Hungarian PPP failures and after that to reconsider the application of P3 contracts.

References

Legal literature

- CSONKA Zsuzsa: *PPP beruházások Magyarországon, az M6-os autópálya esettanulmányán keresztül*. Budapesti Gazdasági Főiskola Külkereskedelmi Főiskolai Kar, Budapest, 2011. http://elib.kkf.hu/edip/D_15762.pdf (2017.09.02.)
- Fazekas Marianna (szerk.): *Közigazgatási jog Általános rész III*. ELTE Eötvös Kiadó, Budapest, 2013.
- HORVÁTH M. Tamás: *Helyi közszolgáltatások szervezése*. Dialog Campus Kiadó, Budapest-Pécs, 2002.

- HORVÁTH M. Tamás: *Közmenedzsment*. Dialog Campus Kiadó, Budapest-Pécs, 2005.
- JENOVAI Petra: *Public Private Partnership az egyes nemzeti jogokban és az Európai Unió jogában különös tekintettel az Egyesült Királyságra és Németországra*. Jogelméleti Szemle, 2011/4. http://jesz.ajk.elte.hu/jenovai48.html#_ftn1 (2016.10.10.)
- KOZMA Miklós Attila: *Értéktérítés Public-Private Partnership keretében – különös tekintettel a vállalkozó szempontjaira*. (Doktori PhD értekezés). Budapesti Corvinus Egyetem Gazdálkodástani Doktori Iskola, Budapest, 2009. http://phd.lib.uni-corvinus.hu/529/1/kozma_miklos.pdf (2016.09.23.)
- KRIZSAI Anita: *A szociális szolgáltatások szervezésének szabályozása a közszektor szereplőinek feladatai szemszögéből*. (Doktori PhD értekezés). Marton Géza Állam- és Jogtudományi Doktori Iskola, Debrecen, 2014.
- LEHMANN Marianna: *A Public-Private Partnership alkalmazásának jelentősége és elszámolása az uniós módszertanban*. In: Simon István (szerk.): *Tanulmányok Nagy Tibor tiszteletére*. Szent István Társulat, Budapest, 2009.
- Leiner Vera (szerk.): *PPP-kézikönyv: a köz-és magánszféra sikeres együttműködés*. GKM, Sajtó és Protokoll Főosztály, Budapest, 2004.
- Papp Tekla (szerk.): *Atipikus szerződések*. Opten Informatikai Kft., Budapest, 2015
- STUMPF István: *Szakmai alapú közigazgatás – A neweuberianus állam*. In: Halm Tamás-Vadász János (szerk.): *A modern állam feladatai*. Magyar Közgazdasági Társaság és a Gazdasági és Szociális Tanács konferenciájának előadásai, Budapest, 2009.
- TASI Péter: *A PPP – alkalmazási lehetőségek, tapasztalatok, avagy: Csodaszer vagy divatos kényszer?* 2004. http://www.sze.hu/etk/_konferencia/publikacio/Net/eloadas_tasi_peter.doc (2017.09.02.)
- Trócsányi László – Schanda Balázs (szerk.): *Bevezetés az alkotmányjogba*. HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2013.
- VARGA Judit: *3P: Életképtelen jogalkotási vadhajítás vagy a közösségi igények kielégítésének működőképes alternatívája?* 2015. <http://kozjavak.hu/3p-eletkeptelen-jogalkotasi-vadhajtas-vagy-kozossegi-igenyek-kielegitese-nek-mukodokepes> (2017.09.03.)
- VARGA Judit: *A partnerség (PPP) szerepének változása a közpénzügyek jogában*. (Doktori PhD értekezés) Marton Géza Állam- és Jogtudományi Doktori Iskola, Debrecen, 2016. <https://dea.lib.unideb.hu/dea/handle/2437/230895> (2016.09.05.)
- VARGA Judit: *PPP a börtönben*. In: Horváth M. Tamás (szerk.): *Kilengések – Közszolgáltatási változások*. Dialog Campus Kiadó, Budapest-Pécs, 2013.
- VARGA Mihály: *A PPP Magyarországon – Árt nekünk vagy használ?* Pénzügyi Szemle 2005/1. 56–70.

YUAN, X.-X. – ZHANG, J.: *Understanding the Effects of Public-Private Partnerships on Innovation in Canadian Infrastructure Projects*. 2016. <http://www.p3canada.ca/en/about-p3s/p3-resource-library/report-on-construction-innovation-in-p3s-by-the-ryerson-institute-for-infrastructure-innovation/> (2017.09.13.)

Legal norms

Act V of 2013 on the Civil Code

Commission of the European Communities: *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions*. Brussels, 15.11.2005. COM(2005) 569 final.

Commission of the European Communities: *Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions*. Brussels, 2004. COM(2004) 327 final.

Other references

Ernst & Young: *Australian infrastructure: some facts and figures*. 2016. [http://www.ey.com/Publication/vwLUAssets/ey-australian-infrastructure-some-facts-and-figures/\\$FILE/ey-australian-infrastructure-some-facts-and-figures.pdf](http://www.ey.com/Publication/vwLUAssets/ey-australian-infrastructure-some-facts-and-figures/$FILE/ey-australian-infrastructure-some-facts-and-figures.pdf) (2017.09.13.)

List of PPP projects in India <https://www.pppinindia.gov.in/project-list> (2017.09.13.)

PricewaterhouseCoopers: *Public-private partnerships in the US: The state of the market and the road ahead*. 2016. <https://www.pwc.com/us/en/capital-projects-infrastructure/publications/public-private-partnerships.html> (2017.09.13.)

Welcome to EPEC. <http://www.eib.org/epec/> (2016.09.05.)

European Parliament: *Addressing conflicts of interest in public-private partnerships (PPPs)*. 2015. [http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/545722/EPRS_BRI\(2015\)545722_REV1_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/545722/EPRS_BRI(2015)545722_REV1_EN.pdf) (2016. 10. 14.)

European PPP Expertise Centre: *Market Update Review of the European PPP Market in 2016. 2017*. <http://www.eib.org/infocentre/publications/all/epec-market-update-2016.htm> (2017.09.14.)